IN THE

Supreme Court of the United States

No. 404

OCTOBER TERM, 1947

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE No. 76, PORT NORFOLK LODGE No. 775, W. M. MUNDEN,

Petitioners,

vs.

TOM TUNSTALL,

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

JAMES B. McDONOUGH, JR.
Counsel for Seaboard Air Line Railroad Company.

INDEX

TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

No. 404

OCTOBER TERM, 1947

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE No. 76, PORT NORFOLK LODGE No. 775, W. M. MUNDEN,

Petitioners,

vs.

TOM TUNSTALL,

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

I.

PRELIMINARY STATEMENT

The undersigned, as counsel for Seaboard Air Line Railroad Company (hereinafter called the Seaboard), and associate counsel, respectfully submit the following brief *amicus curiae*. The written consent of all parties to the cause, required by Paragraph 9 of Rule 27 of the Rules of this Court, has been heretofore filed with the Clerk.

This case involves important questions of general public interest with respect to the administration of the Railway Labor Act, as amended, (45 U.S.C. Sec. 151, et seq.), which counsel *amicus curiae* feel should not be overlooked in the exercise of a judicial power intended to protect the rights of a minority. It also involves questions of general law, of which this Court should take cognizance, respecting the scope of the injunctive powers of the District Courts. Consideration of this case as involving only judicial protection against an unlawful discrimination by a bargaining agent accredited under the Railway Labor Act, would be an unfortunate over simplification. In order to settle administrative questions involved, and for the guidance of the several District Courts and the Circuit Courts of Appeals in the respective circuits with respect to the scope of class injunctive relief in these cases (of which others are pending and in which similar injunctive relief is sought), counsel *amicus curiae* respectfully submit that certiorari should be granted.

To the extent that the points raised in this brief may not be assigned as error by the Petitioner herein, counsel respectfully submit that the points so raised show "plain error" which this

Court should notice even though not so assigned or specified (*United Brotherhood* v. *United States*, 330 U.S. 395).

The essence of the decisions of this Court in the *Steele* and *Tunstall* cases (*Steele* v. *Louisville & Nashville R. Co., et al.*, 323 U.S. 192, and *Tunstall* v. *Brotherhood of L.F.&E., et al.*, 323 U.S. 210) was that the administrative machinery created by Congress in the Railway Labor Act for the making of agreements between carriers and their employees respecting rates of pay, rules and working conditions was inadequate to protect the rights of a minority of the craft or class of firemen employed by the two railroads involved in those cases. If that were not so, the individuals involved and the minorities they represented, would have been relegated, at least in the first instance, to the administrative remedies provided by the act. To that extent the holding created a void. How then were the rights of that minority to be protected? This Court answered that question by saying that in such a situation the Railway Labor Act contemplated resort to the usual judicial remedies of injunction and award of damages.

Counsel *amicus curiae* are not suggesting that this Court should reconsider that holding. They make no contention that the Railway Labor Act excluded Tunstall's claims from judicial consideration. They do not question the power of the District Court to grant injunctive relief. The decisions in the *Steele* and *Tunstall* cases, however, left to the District Courts the difficult and delicate task of formulating the precise terms in which the remedy of injunction would be granted. The question which it is felt this Court should consider is whether the character and extent of that relief, with respect to the Negro firemen, as a class, as granted in this action and as prayed in other pending actions of a similar nature, is proper.

Counsel *amicus curiae* are not presenting questions (except indirectly) with respect to the particular relief which has been granted the individual plaintiff. Tunstall is still employed by the Norfolk Southern Railway Company as a locomotive fireman and the judgment of the District Court, in substance, has directed the Railway Company, irrespective of the provisions of its contract, to restore him as a locomotive fireman to a particular passenger run from which he was ousted, and a jury has awarded him damages. Counsel are seriously concerned, however, with the class injunctive provisions of paragraph 3 of the judgment of the District Court (R.34), which are presumably intended to protect the rights of the class Tunstall represented, and this brief is directed only to the consideration of those provisions.

The injunctive provisions of paragraph 3 of the judgment of the District Court, with respect to the class, are void for uncertainty. Labor agreements of the kind here involved are like a child's house of blocks. Remove one block and the whole structure tumbles. In practical effect the class injunction provisions before the Court here have destroyed the structure and given no directions for rebuilding it. As a result the Brotherhood and the Railway Company cannot proceed to rebuild except under jeopardy of punishment for contempt for violating a general injunction to obey the law. The alternatives which the Brotherhood and the railroad must face in any attempt at compliance with such a direction are set out below. If, to the contrary, this Court should hold that this class injunction is valid in form, and should go further and give some indication of the alternative it would consider acceptable, the courts will have made a new labor agreement affecting the rules and working conditions of a large number of men constituting the entire class of locomotive firemen, contrary to the power conferred

upon the courts and to the express provisions of the Railway Labor Act, and, in such a case, they will have made a contract subject to certain of the same defects and vices which this Court condemned in the *Steele* and *Tunstall* cases *supra*. This does not mean that no relief can be granted, but it does mean that orderly and constitutional procedure requires that the class injunction provisions of judgments to be entered by the District Court in this case, and by the District Courts in other similar cases shall be confined within appropriate and workable limits, and shall be consistent with the policy of Congress as expressed in the Railway Labor Act. The importance of these questions is emphasized by the pendency of other similar actions which counsel believe may properly be called to the attention of this Court.

OTHER PENDING ACTIONS

Similar class actions are pending in the District Courts of the United States, brought by Negro firemen employed by other railroads (including the Seaboard) against the Seaboard and other such railroads and against the Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the Brotherhood) as the representative of the craft or class of locomotive firemen employed by such other railroads, and in which like injunctive relief is prayed. One such action is pending against the Seaboard and against the Brotherhood as the representative of Seaboard firemen, in the District Court of the United States for the Eastern District of Virginia, at Norfolk (*Hinton v. Seaboard, et al.*, Civil Action No. 674). Another is pending against the Atlantic Coast Line Railroad Company (hereinafter called the Coast Line) and against the Brotherhood as the representative of Coast Line firemen, in the District Court of the United States for the Eastern District of Virginia, at Richmond (*Rolax v. Coast Line, et al.*, Civil Action No. 670).

The two actions above mentioned are spurious class actions permitted under Rule 23(a)(3) of the Federal Rules of Civil Procedure. A third action has recently (October 27, 1947) been brought in the District Court of the United States for the District of Columbia which purports to have been brought under the suprious class action rule, although there may be a question whether it comes within that rule. In that action (*Graham, et al.*, v. *Southern Railway Company, et al.*, Civil Action No. 4330-47) four Negro firemen employed by Seaboard, sixteen employed by the Coast Line, and one employed by a subsidiary of the Southern Railway Company (hereinafter called the Southern) were joined as plaintiffs, and as defendants were joined the Southern, the Coast Line, the Seaboard, the Brotherhood, certain subordinate lodges and individuals.

The complaint in the *Graham* case alleged the invalidity of the Southeastern Carriers Conference Agreement (which is attached as Exhibit II to the complaint in the *Tunstall* case and is now before this Court (R. 114)) and prayed for a prelimi nary injunction, as well as a permanent injunction. On the motion for a preliminary injunction (which is still *sub judice* in in some respects although a preliminary injunction was denied as to Seaboard and the proceedings stayed as to it) the relief prayed includes a prayer for an injunction restraining all of the defendants "from recognizing or enforcing or complying with the agreement of February 18, 1941", which is the same Southeastern Carriers Conference Agreement before the Court here, and "from taking any action which would have similar discriminatory or unlawful effect as would the enforcement of such agreements or practices". In short, the *Graham* case seeks to raise, in aggravated form, the difficult and complex administrative questions which are involved in the granting of injunctive relief in proceedings of this character.

In the *Graham* case the United States applied for leave to intervene in support of the plaintiffs' motion for a preliminary injunction, and in its points and authorities said:

> "The public interest in the correct interpretation of the federal statute which caused the Government to appear as *amicus curiae* in the Supreme Court extends equally to the observance of the statute as interpreted".

In those points and authorities, however, the Government proceeded upon the same unfortunate over simplification of the situation and gave the Court no help or suggestions with respect to the precise terms in which injunctive relief could, as a practical matter and in conformity with law, be granted.

THE CLASS INJUNCTION PROVISIONS OF THE JUDGMENT OF THE DISTRICT COURT

The opinion of the District Court states that "injunctions will be entered in accordance with the third and fourth paragraphs" of the prayer for relief (R. 32).

Paragraph third prayed that the defendants should be enjoined from enforcing or otherwise recognizing the binding effect of the Southeastern Carriers Conference Agreement* and the supplement to that agreement made separately with the Norfolk Southern Railway Company (hereinafter, when referred to collectively, called the Agreement) "in so far as said agreement and supplement deprives plaintiff of his assignment

---

*The Petition for Certiorari herein may be thought to imply that it is the railroads and not the Brotherhood that are at the root of the trouble. In this brief counsel do not wish to distribute blame, but feel it proper to point out, as did the Circuit Court of Appeals, that the railroads opposed the demands of the Brotherhood which resulted in the Southeastern Carriers Conference Agreement.

on the passenger train run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway Company" (R. 10-11). The quoted part was strictly confined to the plaintiff's individual situation.

Paragraph fourth prayed that the Brotherhood should be perpetually restrained and enjoined from acting or purporting to act as plaintiff's representative or the representative of the other Negro firemen under the Railway Labor Act, "so long as it of they, or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein" (R.11). Such class, of course, was only the Negro firemen employed by the Norfolk Southern Railway Company.

The judgement of the District Court dated January 21, 1947, makes the following finding (R.34):

> "That the said 'Southeastern Carriers Conference Agreement' and Supplemental Agreement are null and void in so far as they deprive the plaintiff and the class represented by him of seniority and employment rights."

It is the "in so far as" part, the qualification, that destroys the efficacy of that finding of the District Court.

The class injunctive provisions are contained in paragraph 3 of the judgment of the District Court, which reads as follows (R.34):

> "3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually

enjoined from enforcing or otherwise recognizing the binding effect of said 'Southeastern Carriers Conference Agreement' of February 18, 1941, or the Supplemental Agreement of May 23, 1941, in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation of the class he represents as locomotive fireman employed by the defendant Railway."

Again, it is the qualification that defeats the result intended, "or in any way interferes with the occupation of the class he represents as a locomotive fireman employed by the defendant Railway". The determination of how the agreement and the supplement thereto (hereinafter simply called the Agreement) may be administered so as not to interfere with the occupation of the class of Negro locomotive firemen employed by the Norfolk Southern Railway Company and represented by Tom Tunstall is not a simple matter.

SPECIFICATION OF POINTS

1. The injunctive provisions of paragraph 3 of the judgment of the District Court are void for indefiniteness and generality. The Agreement is not found void *in toto* and no specific act is enjoined nor any specific course of conduct prescribed. The factual situation involved is extremely complicated. The Brotherhood and the railroads cannot be compelled to pick their way at their peril, confronted on the one hand with criminal and civil liability under the Railway Labor Act and on the other hand with punishment for contempt.

New York, N. H. & H. R. Co. v. *Interstate Commerce Commission,* 200 U.S. 361.
National Labor Rel. Bd. v. *Express Pub. Co.* 312 U.S. 426.

2. If the injunctive provisions of paragraph 3 of the judgment of the District Court require (a) the "complete equality" which is mentioned below, or if they require (b) the restoration of the condition existing prior to the Agreement, the injunction constitutes a change in the Agreement which the District Court has no power to make under the provisions of the Railway Labor Act and which is beyond the power of the District Court to make as a matter of general law.

Burke v. *Morphy,* 109 F. (2d) 572, cert. den. 310 U.S. 635.
Hague v. *Committee for Industrial Organization,* 307 U.S. 496.

3. If the District Court, through the injunctive provisions of paragraph 3 of its judgment, has in fact made a new agreement between the parties, its judgment has the same vice condemned by this Court in the *Steele* and *Tunstall* cases, *supra.* As to the Negro firemen, on all roads, the fruit of an equality imposed by the fiat of a court may have the taste of aloes. The District Court, rather than the accredited bargaining agent, will have made a new contract which may have unfavorable effects on some of the members of the craft (white as well as Negro, upon certain railroads other than the Norfolk Southern Railway Company), and there is no showing that such members, as a class, have been heard.

Steele v. *Louisville & Nashville R. Co., et al.,* 323 U.S. 192.
Tunstall v. *Brotherhood of L.F. & E., et al.,* 323 U.S. 210.

4. By virtue of the provisions of the Railway Labor Act respecting the manner in which agreements with employees must be changed, and the reasons for such provisions, the injunctive power of the District Courts in these cases should be limited to requiring the accredited representative of the employees to proceed in accordance with the Act, to give the required notice of a proposed change, and to proceed to negotiate a new agreement in conformity with law, with notice to and an opportunity to be heard on the part of any minority, whether white or Negro. Whether there was compliance with such requirements would be a proper subect of inquiry by the District Courts in enforcing their decrees

Virginian Ry. Co. v. *System Federation No. 40,* 300 U.S. 515.

ARGUMENT

1. *The class injunctive provisions of paragraph 3 of the judgment of the District Court are void for indefiniteness and generality.*

Paragraph 3 of the judgment of the District Court perpetually enjoins the defendants from enforcing or otherwise recognizing the binding effect of the Agreement, insofar as said Agreement "in any way interferes with the occupation of the class he [the plaintiff] represents as locomotive firemen employed by the defendant Railway."

Tunstall represents a class of firemen who have long years of seniority but are not required to take examinations for promotion to the position of engineer. Under the Agreement, and

under the Schedule* as in effect prior thereto, the so-called promotable firemen were and are required to take, within a limited time, comparatively difficult promotional examinations, and if they decline to take them, or fail to pass them, they are dropped from the service (R. 18). Upon being promoted to the position of Engineer, the promotable fireman goes to the foot of the engineers' roster and was and still is required to take any engineer's assignment that may be available, and those assignments are usually less desirable than assignments as firemen at the top of the firemen's roster which he is not permitted to protect as long as there is available to him an engineer's assignment. As a result, the top of the firemen's seniority roster, prior to the Agreement, was composed largely, if not entirely, of Negro firemen who were not compelled to take the promotional examinations and who ran no risk of discharge for failure to take or to pass them, but who took and held all, or substantially all, of the desirable assignments, from which it was the white firemen who were the ones excluded. One effect of the Agreement in substance was to keep the Negro firemen from having all or a majority of the good jobs as firemen and to permit the white firemen to have at least one-half of such jobs, even though there were numerically more white firemen than Negro firemen. In that situation, how can the Brotherhood or a railroad know how to proceed under such an injunction?

Will it remove interference with the occupation of the Negro locomotive firemen if the non-promotable classification is removed? The record contains an affidavit by one John W. Barron, an engineer on the Louisville & Nashville Railroad Com-

*The Agreement, as defined, was in fact only an amendment to the more complete agreement with the firemen covering rates of pay, rules and working conditions, and the complete agreement is referred to herein as the "Schedule".

pany, who became such through promotion from a fireman, and which is submitted as typical of the class he represented (R. 159). His affidavit shows that under the Schedule and the practice of the railroads, engineers are taken from the ranks of firemen; that over a period of four years he took the first year and second year written mechanical examinations required of firemen on that road; that following those examinations he was required to take the written mechanical promotional examination and an operating rules examination, and that after that he took oral examinations covering mechanical subjects and operating practices, which consumed an entire day (R. 161). He stated that in order to prepare for those progressive and promotional examinations he studied consistently during his off hours from work over a period of three years and that (R. 161):

> "All of these examination were very difficult, and one had to possess a very complete and detailed knowledge of all subjects covered by the examination to be able to pass them satisfactorily."

Engineer Barron further stated that he was personally acquainted with all of the firemen on the Montgomery-Mobile Division of the Louisville & Nashville Railroad Company and that (R. 163):

> "I am certain that if the non-promotable firemen now employed on the Montgomery-Mobile Division were forced to prepare themselves and take promotional examinations, the same as the promotable firemen are required to do, the vast majority would be incapable of qualifying as engineers."

The statements of Engineer Barron are supported by statements contained in the affidavit of David B. Robertson, the

President of the Brotherhood, which appears in the record (R. 165). Robertson states that not only are the promotional examinations highly technical and difficult, but that a great amount of time and effort must be invested by firemen over a long period during off hours to be able to successfully pass those examinations and he points out that on the Atlantic Coast Line alone, between 1939 and 1946, a total of 62 firemen (necessarily white firemen) failed in their examinations, either progressive or promotional, and were dismissed from the service (R. 177) and they are listed by name (R. 186).

Robertson further states that at the time of the negotiations resulting in the Southeastern Carriers Conference Agreement consideration was given by the Brotherhood to a proposal that the non-promotable firemen should be required to take those examinations but that, apart from the question whether the Southeastern Carriers would agree to that proposal "it was deemed undesirable and dropped from consideration because of the unanimous opinion of the general chairmen that the vast majority of the non-promotable firemen would be unable to qualify as engineers by sucessfully passing the promotion examinations, and would, as a result, suffer either dismissal from the service or be reduced in seniority standing to the foot of the seniority roster." (R. 180). Displacement to the foot of the firemen's seniority roster is stated to be in practical effect often the same as dismissal (R. 175). On the Norfolk Southern Railway Company the penalty is dismissal (R. 18).

Certainly the Negro firemen cannot be permitted to become engineers upon any less thorough examination than that required of white firemen. By the same token. if the classification of non-promotable is removed, and all discriminations or differences on account of race are to be removed, no good reason

would appear why they should not be compelled to take those examinations. If that is done, instead of not interfering with the occupation of the Negro locomotive firemen the locomotive may become a tumbril and the click of the rails the gride of the Paris cobblestones*.

The record is also clear that on most railroads employing Negro firemen there are numerous white firemen who are classified as non-promotable because they had entered the service prior to the time the taking promotional examinations was made compulsory. Robertson states that in 1941 there were four such on the Central of Georgia, twenty-eight on the Southern, fifty-four on the Louisville & Nashville, and twenty-nine on the Seaboard, a total of one hundred and fifteen on those four roads alone (R. 180). It appears from the definition of non-promotable firemen contained in the Supplementary Agreement here involved (R. 19) that the Norfolk Southern Railway Company has no white non-promotable firemen, but on roads that do have white non-promotable firemen, their status is no more to be overlooked in the effort to do justice and equity than that of the Negro non-promotable firemen.

Will it remove interference with the occupation of the Negro locomotive firemen if, instead of requiring them to take the promotional examinations, the Agreement is simply held void *in toto*, and the situation is restored to what is was prior to the Agreement, and a large number of white firemen are summarily displaced from their present jobs and offered either

*The Schedule Agreements frequently provide that if a fireman should fail on any one examination he will be entitled to a re-examination within a short period and contain the further provision that upon such re-examination a representative of the Brotherhood shall be entitled to be present.

less desirable jobs or no jobs at all? Perhaps so, but what does that do to the occupation of locomotive firemen, as such? Under the law, the railroads are forbidden by unilateral action to change the rates of pay, rules, or working conditions of their employees. (Sec. 2 of the Railway Labor Act).

Will the railroads, if such a course is followed (unless the judgment of the District Court constitutes protection) be subject to the criminal provisions of the Railway Labor Act as well as be subjected to numerous suits for damages by the white locomotive firemen so displaced? On the other hand, if the judgment of the District Court requires the complete equality above mentioned, and the non-promotable white firemen are required to take the promotional examinations, will the railroads, with respect to such non-promotable white firemen, be also subject to the criminal penalties of the Act and to suits for damages by such firemen whether or not they pass the promotional examinations? The rules and working conditions applicable to such white non-promotable firemen will have been changed without their consent. Even if they pass, they will get less desirable jobs. Which alternative should the parties take, or what course should they follow, in the face of the class injunctive provisions of the judgment in this case?

Under the circumstances disclosed by this record, counsel *amicus curiae* respectfully submit that compliance with the command of that judgment, in the form as written, is impossible of attainment, and that the injunctive provisions of paragraph 3 of the judgment of the District Court are void. On that point there are two decisions of this Court which we submit are controlling.

In the case of *National Labor Rel. Bd.* v. *Express Pub. Co.*, 312 U.S. 426, this Court found a cease and desist order of the National Labor Relations Board to be too broad. This Court said that (at page 435) "we can hardly suppose that Congress intended that the Board should make or the Court should enforce orders which could not appropriately be made in judicial proceedings". With respect to orders which could appropriately be made in judicial proceedings this Court said (at page 436):

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed."

In the case of *New York, N.H. & H.R. C.* v. *Interstate Commerce Commission*, 200 U.S. 361, at page 404, this Court said:

> "In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the Act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it."

2. *If the injunctive provisions of paragraph 3 of the judgment of the District Court have, in fact, created a new contract, the judgment of the District Court was (a) beyond its power under the Railway Labor Act and (b) invalid as a matter of general law.*

The facts and authorities set out in Point 1 above would seem to be conclusive of the invalidity of the injunction, in the respect there discussed, and this brief could well stop with that point. Counsel *amicus curiae*, however, are more than mere advocates, and the decision on that point alone would leave unsettled other and vexatious questions which should be considered and passed upon by this Court.

The Interstate Commerce Commission, when it takes jurisdiction under Section 3 of the Interstate Commerce Act in cases involving racial discrimination with respect to passengers upon railroad trains, issues its report and order directing specificially the action to be taken or not to be taken by the carrier, and the parties have a guide to their future conduct (*Henderson* v. *Southern Railway*, 258 I.C.C. 413, and *Henderson* v. *United States*, 63 Fed. Supp. 906). Where agreements with the employees of a carrier are involved, however, the order of the District Court can not specify, by restraint or by command, with such particularity, as to do so would constitute the making of a new such agreement.

For the purposes of this Point 2 it makes no difference whether the District Court intended to command that complete equality, mentioned above, or the restoration of the status existing prior to the Agreement, or some other and alternate arrangement. The essential facts are that whatever was intended, a new agreement has been made that affects all firemen, with no steps

whatsoever having been taken to comply with the requirements of paragraphs Sixth and Seventh of Section 2 of the Railway Labor Act. It may be argued that paragraph Sixth was inapplicable, as no "dispute" was involved, but it cannot be denied that paragraph Seventh, by its very terms, is applicable.

Paragraph Seventh reads as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The District Court has commanded the Norfolk Southern Railway Company to change the rules and working conditions of its firemen, contrary to the express prohibition of that statute.

The power of a District Court of the United States to make a new or different contract between the carrier and its employees with respect to wages was expressly denied in the case of ***Burke*** v.*Morphy*, 109 F. (2d) 572, *cert. den.* 310 U.S. 635. In that case the Circuit Court of Appeals for the Second Circuit, said:

> "The order did affect wages and was in substance a wage cut; no wage cut may be imposed unless the provisions of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., are first obeyed; and no attempt was made to comply with this Act. The Railway Labor Act (48 Stat. 1185, 45 U.S.C.A. § 151) applies to every interstate carrier, including a carrier that is being operated by a receiver. The Act forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement. *** A contention that this order did not even 'affect' existing agreements between the carrier and the various brotherhoods is frivolous."

The statute in question there was the same as the one here involved, to-wit: Paragraphs Sixth and Seventh of Section 2 of the Railway Labor Act. Both refer to agreements respecting "rates of pay, rules or working conditions". No reason exists why a District Court of the United States can make a new contract respecting rules or working conditions if it cannot make one with respect to wages. Counsel *amicus curiae* respectfully submit that if the judgment in this case is upheld, the *Burke* case has been overruled, and the Railway Labor Act has been found to have conferred upon the courts of the United States power over the wages, rules and working conditions of the employees of the carriers of this country far in excess of the power of those courts as exercised through injunctive process prior to the passage of the Norris-LaGuardia Act. (29 U.S.C. Sec. 101, et seq.), and a precedent dangerous to the liberties of labor will have been established (cf. *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U.S. 91).

As a matter of general law, the District Court had no such power. In the case of *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, where an injunction had been issued finding an ordinance of the City of Jersey City to be void and enjoining the city officials as to the manner in which they should administer the ordinance, the Court said (at page 518):

> "As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They [the respondents] are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does."

In this case, the Agreement can not be considered apart from all its provisions, nor apart from the Schedule. If the Agreement

is sought to be retained, with only the non-discriminatory provisions stricken out, a new agreement has in fact been made, even though its exact terms may be uncertain. Whatever they are, or were intended by the Court to be, they constitute a new agreement. By the same token, the District Court in this case would have exceeded its power if it had simply found the Agreement (as was required by this Court in the *Hague* case, *supra*) to be void in its entirety, for there would necessarily have resulted a new agreement. This argument does not defeat itself, nor is it a return to the argument that by reason of the provisions of the Railway Labor Act the claims of the plaintiff were not justiciable for there are well defined limits, as mentioned under Point 4, within which the injunctive power in these situations can lawfully and effectively be applied.

3. *The class injunctive provisions here questioned would, if valid, create a new contract having the same vice condemned by this Court in the Steele and Tunstall cases.*

Tunstall is only one of approximately one thousand Negro firemen employed by the railroads parties to the Southeastern Carriers Conference Agreement. His action is brought as a class action on behalf of only the class of Negro firemen employed by one of such railroads (R. 4), and not on behalf of all Negro firemen. He asked for specific relief for himself, to be restored only as a firemen to one particular and specified passenger run, and to be awarded his individual damages, but with respect to the common question of law and fact he asked general injunctive relief in favor of all constituting his class. Nevertheless, if the judgment of the District Court is permitted to stand in its present form, it will vitally affect all Negro firemen and all the railroads by which they are employed, and all the members on such railroads of the Brotherhood.

Tunstall, one individual, brought and proceeded to judgment with his action under the rule allowing such spurious class suits. No other Negro locomotive fireman, so far as we are advised, joined in his action. That may be argued to indicate acquiescence by the class, but it may as well show lethargy, the timidity of a frequently inarticulate group, or simply lack of understanding, with probably no anticipation whatever of the possible effect of the judgment that would be entered in the proceedings.

Under Rule 23(c) of the Federal Rules of Civil Procedure Tunstall could not have dismissed or compromised his action without the approval of the District Court, and under that rule the District Court was authorized, upon any proposed dismissal or compromise, to require that notice thereof be given to all members of the class in such manner as it might direct. The case proceeded to judgment, rather than a dismissal or a compromise, so that Rule 23(c) was not applicable by its terms, and we intend no criticism of the District Court. The District Court, as a matter of fact, and as we show in Point 2 above, cannot be substituted as the bargaining agent of the employees, but, when it was in practical effect acting as such, the situation was clearly one in which it would have been appropriate for the notice authorized by that rule to have been given. As pointed out in the case of *Burke* v. *Morphy, supra,* with respect to the employees of the Receiver of the Rutland Railroad Company, even assuming their privilege to intervene they were under no obligation to do so and "the existence of the privilege is not equivalent to actual intervention. Unless they exercised their privilege, they remained strangers to the litigation." The employees there were not parties to a class suit but the situation is analogous.

The possible unfavorable effects, upon even the members of the class Tunstall represented, have been pointed out above. As a result of proceeding to judgment as it did, the District Court, rather than the bargaining agent as in the *Steele* and *Tunstall* cases, has made a new contract which may have unfavorable effects on some of the members of the craft (not merely, even, the class of Negro firemen, for non-promotable white firemen on other roads may be unfavorably affected by similar judgments), and there is no showing that they have been given notice and an opportunity to be heard (unless the pendency of the action and the entry of a judgment establish a presumption to that effect), and there is certainly no showing that, as a matter of fact, such other members were heard and their wishes consulted with respect to the form and effect of the judgment.

The result is contrary to the very requirement of this Court that whenever necessary to a fair and impartial representation, the bargaining agent *is required* to consider requests of minority members, "and expressions of their views with respect to collective bargainning with the employer and to give to them notice of and opportunity for hearing upon its proprosed action." *Steele* v. *Louisville & Nashville R.R. Co., et al.*, 323 U.S. 192.

4. *By reason of the provisions of the Railway Labor Act, the injunctive powers of the District Courts, in these cases, should be limited to requiring the bargaining agent to proceed under the machinery of the Act with the negotiation of such changes in rules and working conditions as may be appropriate to remove the claim of discriminatory representation.*

The Railway Labor Act, for reasons which do not require restatement here, prohibits changes in wages, rules and working

conditions except upon compliance with the machinery set forth in the Act.

The District Courts, as pointed out above, should not, and we respectfully submit that they cannot, be constituted the bargaining agent for the employees. The power of the District Courts in these cases should be limited to compelling the bargaining agent to give the notice required, and to proceed in accordance with the machinery of the Act with the negotiation of changes in rules and working conditions that will result in an amended contract containing no differences not relevant to its authorized purposes, within the allowable limits outlined in the opinion of this Court in the *Steel* case, *supra.* For that purpose there can be no question but that the District Courts have ample and effective power, under the decision of this Court in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515.

In that case it was argued that the obligation of the Railway Labor Act requiring the carrier to negotiate with the representative of its employees was not the appropriate subject of a decree in equity and that since equity could not compel the parties to agree it should not compel them to take the preliminary steps which might result in an agreement. The language of this Court, in response to that argument, is particularly appropriate upon this point. This Court said (page 550):

> "There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent *and the affirmative duty to treat with respondent.* * * * *Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.*" (Italics supplied).

In concluding its discussion of that point this Court said (553) "The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court." The same cannot be said of the judgment here under consideration.

CONCLUSION

We respectfully submit that certiorari should be granted in this case and that the decision of the Circuit Court of Appeals should be reversed and the proceedings remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

JAMES B. McDONOUGH, JR.
Counsel for Seaboard Air Line Railroad Company.

W. R. C. COCKE.
FRANK J. WIDEMAN.
Of Counsel.

Dated November 17, 1947.